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**IN THE UNITED STATES DISTRICT COURT**

**FOR THE SOUTHERN DISTRICT OF CALIFORNIA**

CARMEN POWELL,

Plaintiff,

v.

CITY OF CHULA VISTA; CHULA VISTA POLICE DEPARTMENT; DET. RUTH HINZMAN; AGT. ANDERSON; AGT. OYOS; SGT. CERVANTES; AND PERSON ENTITIES UNKNOWN; COUNTY OF SAN DIEGO AND SAN DIEGO COUNTY PROTECTIVE SERVICES WORKERS JULIE SMITH, NADIA NAJORS, MEGAN PETFINGER, REBECCA SLADE AND PERSONS AND ENTITIES UNKNOWN, CHILDREN'S HOSPITAL; DIANA CHASE, NURSE DEBRA DAVIES, LCSW,

Defendants.

No. 07-cv-1836-JAH(JMA)

**MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO PLAINTIFF'S MOTION TO FILE SECOND AMENDED COMPLAINT**

Date: September 29, 2008
Time: 2:30 p.m.
Dept.: 11 - Courtroom of the Honorable John A. Houston
Trial Date: None

**STATEMENT OF CASE**

Plaintiff commenced this action by filing a complaint on September 19, 2007. Although the caption of her original complaint named perhaps eleven defendants, only four responded to the complaint. Apparently, no others were ever served. The four who did respond moved to dismiss. At the March 3, 2008, hearing on the motions to dismiss, the Court instructed plaintiff file an amended complaint consistent with the

Court's ruling. On May 22, 2008, plaintiff filed a fourteen page first amended complaint. Because the first amended complaint did not name three of the original four responding defendants, the Court dismissed those defendants (Children's Hospital, Diana Chase and Dr. Morteza Mirkarimi, Doc. 50.) The fourth responding defendant Julie Smith then moved to dismiss the first amended complaint. That motion is under submission.

Plaintiff's claim arises out of the removal of her children from her home, and the issuance of orders and judgments by the California Superior Court Juvenile Division finding the removal to be proper and designating the children as dependents of the court under California Welfare and Institutions Code section 300 et seq.

Plaintiff complains that false evidence was used to obtain the dependency orders and judgment removing the children from her custody. Because plaintiff's action seeks to have this Court re-weigh and re-evaluate the evidence and arguments on which the dependency orders and judgment were based, defendant Smith moved to dismiss the entire action because it is barred by the Rooker-Feldman doctrine; precluded by the claim preclusion defense; fails to state a claim against defendant Smith who has absolute immunity for participating in the juvenile dependency proceedings; and because the matters about which plaintiff complains are within the exclusive jurisdiction of the California Superior Court.

Plaintiff now asks for leave to file a second amended complaint even while this Court has under submission defendant's motion to dismiss her first amended complaint.

## I

## PLAINTIFF'S REQUEST TO AMEND SHOULD BE DENIED BECAUSE IT PREJUDICES DEFENDANT, WILL CAUSE DELAY AND IS FUTILE

Under Federal Rule of Civil Procedure, rule 15, amendments will be denied where it would cause prejudice to the opposing party, is sought in bad faith, is futile, or

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creates undue delay. *Moore v. Kayport Package Exp., Inc.*, 885 F.2d 531, 538 (9th Cir. 1989).

> "In deciding whether justice requires granting leave to amend, factors to be considered include the presence or absence of undue delay, bad faith, dilatory motive, repeated failure to cure deficiencies by previous amendments, undue prejudice to the opposing party and futility of the proposed amendment. (citations omitted) Leave to amend need not be given if a complaint, as amended is subject to dismissal. (citations omitted)." *Id.*

Plaintiff seeks to file a second amended complaint that she says does not add claims but only embellishes the facts underlying her lawsuit so the Court can better understand her assertions. The proposed second amended complaint is 54 pages long, has legal arguments regarding motions to dismiss (at p. 20), has four single spaced pages of legal citations, itemizes no less than 15 theories of recovery including state law claims for which no California Tort Claims Act claim is alleged to have been filed prior to the commencement of the action (the failure to file a tort claim subjects the state law claims to dismissal under California Government Code section 945.4), and adds another six people to the list of defendants including the re-naming of the three original responding defendants whom this court dismissed.

The rambling factual narrative and statement of legal argument seems more like an opposition memorandum to defendant Smith's motion to dismiss than a complaint. Plaintiff's request for leave to file the second amended complaint should be denied. Granting plaintiff's request to file the document as an amended complaint will cause prejudice to defendant, will delay a disposition of this action, and because the second amended complaint suffers from the same defects as does the first amended complaint, if not more, it would be subject to dismissal and hence futile.

Plaintiff's motion to file a second amended complaint is premature because the Court has yet to rule on defendant's motion to dismiss. Defendant identified jurisdictional and claim preclusion defects fatal to her action. The proposed second amended complaint does not address those defects. Plaintiff cannot reasonably

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propose amendments to rectify those defects, if any, absent a ruling on the motion to dismiss.

Plaintiff's motion for leave to file a second amended complaint should be denied because it prejudices defendant insofar as it, as a practical matter, seeks to circumvent issuance of a ruling on the motion to dismiss that the Court has under submission. Leave to amend would also result in a waste of the defense and judicial resources already dedicated to the preparation and analysis of defendant Smith's motion to dismiss. In preparing the motion to dismiss, defendant expended substantial time and resources to provide the Court with a summary of the Superior Court Juvenile Division's dependency proceedings with cross-references to the allegations of plaintiff's first amended complaint at the Court's request. Should plaintiff be allowed to file a second amended complaint before the Court rules on the motion to dismiss, defendant's efforts in preparing the motion to dismiss would be for naught. Even if defendant's motion to dismiss is partially successful, it would be incumbent on plaintiff to amend in accordance with the Court's ruling. This, plaintiff cannot hope to achieve by filing a second amended complaint at this time.

Allowing plaintiff to file a second amended complaint at this time would result in delaying the resolution of the legal issues raised by defendant's motion to dismiss. It is appropriate to deny leave to amend when a motion to dismiss is pending, and plaintiff has had the opportunity to correct pleadings, and allowance of the amendment would delay resolution of the motion to dismiss. (*See Dopp v. Loring*, 245 Fed.Appx. 842, 850 (10th Cir. 2007), unpub., cited for limited purpose as allowed under Fed. Rule App. Proc., rule 32.1). And because the proposed second amended complaint suffers from the same basic jurisdictional and claim preclusion defects as the first amended complaint, namely that plaintiff is seeking damages based on the Superior Court dependency orders and judgment that have not been reversed, her proposed second amended complaint is futile.

Plaintiff's motion to amend should be denied.

## II

## BY HER MOTION TO FILE SECOND AMENDED COMPLAINT, PLAINTIFF IS ATTEMPTING TO ADD NEW PARTY DEFENDANTS WITHOUT SHOWING SHE DID NOT KNOW ABOUT THEM WHEN SHE COMMENCED THIS LAWSUIT

Plaintiff seeks to add even more defendants to her second amended complaint than she did in her first amended complaint. In defendant's motion to dismiss the first amended complaint, defendant pointed out that although fictitiously designated defendants can be named after the original complaint is filed, that practice is allowed in federal court only if California fictitious defendant designation and inclusion requirements can be satisfied. *Merritt v. Co. Los Angeles*, 875 F.2d 765, 768 (9th Cir. 1989). To add a defendant in place of a fictitiously named defendant the plaintiff must be ignorant of the defendant's true name. *Id* at fn. 6. Here, plaintiff's motion to file an second amended complaint does not demonstrate she did not know the names of the people she wants to add as new parties. Because the newly named defendants are her attorney and the social workers she dealt with during the Superior Court dependency proceedings, it is unlikely that she could satisfy the ignorance of true name requirement. The amendment to add previously known persons as defendants is impermissible and should be disallowed.

## CONCLUSION

Based on the foregoing, plaintiff's motion to file a second amended complaint should be denied.

DATED: September 9, 2008

Respectfully submitted,

JOHN J. SANSONE, County Counsel

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# PROOF OF SERVICE BY MAIL

**[Carmen Powell v. City of Chula Vista, et al.; USDC No. 07-cv-1836-JAH(JMA)]**

I, ROSANNA LONERO declare that: I am over the age of eighteen years and not a party to the case; I am employed in the County of San Diego, California where the mailing occurs; and my business address is: 1600 Pacific Highway, Room 355, San Diego, California.

I further declare that I am readily familiar with the business practice for collection and processing of correspondence for mailing with the United States Postal Service; and that the correspondence shall be deposited with the United States Postal Service this same day in the ordinary course of business.

I served the following document(s): **Memorandum of Points and Authorities in Opposition to Plaintiff's Motion to File Second Amended Complaint** by placing a true copy of each document in a separate envelope addressed to each addressee, respectively, as follows:

Carmen Powell
372 Bay Leaf Drive
Chula Vista, California 91910

Plaintiff in Pro Per

I then sealed each envelope and, with the postage thereon fully prepaid, I placed each for deposit in the United States Postal Service, this same day, at my business address shown above, following ordinary business practices.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on September 9, 2008 at San Diego, California.

Rosanna Lonero
ROSANNA LONERO